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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 818

LOUIS S. NELSON, Warden, San Quentin State Prison, et al.,
Petitioners,

vs.

WILLIE C. COLEMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioners, Louis S. Nelson,[1] Warden, and the People of the State of California, appellees below, respectfully petition that a writ of certiorari issue to

[1]Louis S. Nelson, present warden of the California State Prison at San Quentin, has been substituted for Lawrence E. Wilson, former warden.

the United States Court of Appeals for the Ninth Circuit to review the decision of that Court entered on October 8, 1968, reversing and remanding the order of the United States District Court.

OPINIONS BELOW

The opinion of the Court of Appeals is as yet unreported and is appended hereto as Appendix A. The opinion of the United States District Court for the Northern District of California is unreported and is appended hereto as Appendix B.

JURISDICTION

On October 8, 1968, the United States Court of Appeals for the Ninth Circuit reversed the order of the United States District Court for the Northern District of California dismissing Willie C. Coleman's petition for writ of habeas corpus. A timely petition for rehearing was filed, and was denied on November 5, 1968. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254(1).

QUESTION PRESENTED

Whether an evidentiary hearing is a mandatory requirement under federal habeas corpus procedure when the Federal District Court has found that a state prisoner's claim that his plea of guilty was in-

voluntary is refuted by the record and that an affidavit of his defense counsel establishes that no substantial issue of fact exists to be resolved in an evidentiary hearing.

STATUTE INVOLVED

This case involves interpretation of the federal Habeas Corpus Act, 28 U.S.C. §§ 2241-2255. Relevant sections are reproduced in Appendix C.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Willie C. Coleman, the petitioner for writ of habeas corpus below, and respondent in this Court, was convicted on September 13, 1965, in the Superior Court of the County of Los Angeles, upon his plea of guilty, of two counts of first degree robbery in violation of California Penal Code section 211. He was sentenced to state prison for the term prescribed by law, the sentences to run consecutively. *People v. Willie C. Coleman,* No. 304328. (CT 75).[2] He did not appeal from this judgment. Subsequently, however, Coleman filed applications for writs of habeas corpus in the Superior Court of San Bernardino County which were denied on November 15, 1965, and December 29, 1965, No. 129122. An application for writ of habeas corpus to the Court of Appeal, First Appellate Dis-

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[2]References are to the Clerk's Transcript on Appeal from the order of the District Court.

trict, filed on January 3, 1966, was denied on January 5, 1966, Crim. 5490. His petitions for writ of habeas corpus in the Supreme Court of California were denied on March 22, 1966, Crim. 9827, and February 1, 1967, Crim. 10551. Following the application to the United States District Court discussed below, Coleman, on October 18, 1966, filed for relief under Rule 31(a) in the Court of Appeal, Second Appellate District. Relief was denied by that court on October 20, 1966, and his petition for hearing was denied by the Supreme Court of California on December 14, 1966.

B. Proceedings in the Federal Courts

On September 23, 1966, the United States District Court for the Northern District of California denied Coleman's application for writ of habeas corpus filed in that court, on the grounds that he had failed to exhaust state remedies because he might have a right to a belated appeal under Rule 31(a), California Rules of Court, No. 45670. (CT 26.) On December 15, 1966, a petition for rehearing was denied by the court for the same reason. (CT 41-42.) Following his unsuccessful petition for this relief in the California courts, as described above, the District Court, on February 10, 1967, entered its order denying relief on all grounds as alleged in the petition in case No. 45670, but granting thirty days in which to amend his petition to reflect all facts surrounding his plea of guilty in relation to the voluntariness of this plea. (CT 56-58.) On February 23, 1967, Coleman filed his

amended petition (CT 59-63), and the Court issued an order to show cause. (CT 65.) The People filed a timely return (CT 66-121), appellant filed a traverse (CT 121-34), and on May 25, 1967, counsel for the People appeared before the Court.

On June 7, 1967, the Court entered its order denying the petition for writ of habeas corpus. (CT 136-46.) On June 28, 1967, Coleman filed a petition for rehearing or, in the alternative, a petition for certificate of probable cause to appeal and leave to appeal in forma pauperis. (CT 141-47.) On July 7, 1967, the court denied the application for rehearing, and granted leave to appeal in forma pauperis. (CT 149-50.) Subsequently, Coleman filed a motion to amend this petition. (CT 151-57.) Notice of appeal was filed on July 18, 1967. (CT 158.)

On October 8, 1968, the Court of Appeals reversed the order of the District Court, and remanded the case for an evidentiary hearing. Timely petition for rehearing and suggestion for rehearing in banc was denied on November 5, 1968.

STATEMENT OF FACTS

In an information filed on July 23, 1965, Willie C. Coleman and a co-defendant, Adolph Bonner, were charged with twelve counts of violations of the California Penal Code: section 187 (murder), count 1; section 211 (robbery), counts 2-7, 9-11; and section 209 (kidnapping for robbery with bodily harm),

counts 8, 12. Petitioner was also charged with one prior felony conviction. (CT 88-101.)

Coleman was arraigned on May 27, 1965, while represented by a public defender, and entered pleas of not guilty. (CT 103.) On July 7, 1965, on Coleman's motion, the public defender was relieved and Dan O'Neill was appointed to represent him. (CT 104, 105.) On July 12, 1967, counsel moved for dismissal of the charges pursuant to section 995 of the California Penal Code. (CT 105.) On July 29, 1965, the motion was granted as to count one (murder), and denied as to the other counts. (CT 105, 106.)[3]

On August 10, 1965, Coleman and his co-defendant, each represented by separate counsel, withdrew their pleas of not guilty to counts two and seven of the information and entered pleas of guilty thereto. Coleman also admitted the prior conviction charged. (CT 107.)

The Court found the offense to be first degree robbery, and at counsels' request, continued the case to September 13, 1965, for probation and sentence hearing. (CT 110-11, 113.)

On September 13, 1965, probation was denied, and Coleman was sentenced to state prison for the term prescribed by law on each count, the terms to run

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[3]The murder charged was that of John Jeter, the third man involved in the robberies with appellant and his co-defendant, Bonner. (See CT 88, 110, 112.) Counsel succeeded in having the charges dismissed on the authority of *People v. Washington*, 62 Cal.2d 777 (1965) (decided on May 25, 1965), which changed the California felony murder doctrine. (See CT 118.)

consecutively. The remaining counts, two of kidnapping and seven of robbery, were dismissed. (CT 75.) Under California law, a death sentence could have been imposed had Coleman been found guilty of the kidnapping.

In his petition filed in the District Court, Coleman alleged that this plea of guilty was not voluntarily made but was the product of a promise of probation, fear of the death penalty, and threatened withdrawal of counsel on the eve of trial, and was made in ignorance of the consequences. On these allegations the District Court issued an order to show cause. The People's return included a transcript of the proceedings at the time the plea was taken for Coleman and for the co-defendant Bonner who entered a plea immediately before Coleman's. In addition, the People obtained the affidavit of Coleman's counsel and included it in the return. The affidavit is reproduced in Appendix D.

The transcript of proceedings shows that at the time the plea was taken, Coleman's co-defendant was examined first, and *inter alia,* was asked whether there had been any promises of reward or lesser sentence or probation. (CT 109.) He then entered his plea. The proceedings continued with respect to Coleman, as follows:

> "Mr. O'Neill: Now with respect to defendant Coleman, your Honor, I have counselled with him and advised him of his constitutional rights and have discussed the charges with him, have discussed with him the alternatives that are open to him in this matter. Mr. Coleman advises me

that he desires to make his plea as to counts 2 and 7 of the Information in this case. He also tells me that he wishes to admit the allegations of prior conviction.

The Court: Take the plea.

Mr. McCormick: Your name is Willie C. Coleman, is that correct?

Defendant Coleman: Yes sir.

Mr. McCormick: Mr. Coleman, you understand the charges that have been placed before you and brought you here to Court this morning, do you not?

Defendant Coleman: Yes.

Mr. McCormick: And you have discussed this matter with Mr. O'Neill, your lawyer?

Defendant Coleman: Yes.

Mr. McCormick: You have indicated, through him, that it is your desire at this time to plead guilty to two counts contained in that Information, the Information being number 304328, the counts being 2 and 7. Count 2 charges you with the crime of robbery and Count 7 charges you with the crime of robbery. Do you understand that?

Defendant Coleman: Yes.

Mr. McCormick: And it is your desire at this time to plead guilty to those two counts, is that correct?

Defendant Coleman: Yes.

Mr. McCormick: Mr. Coleman, you are doing that because you believe you are guilty of those two counts?

Defendant Coleman: Yes sir.

Mr. McCormick: There has been no threats or promises made to make you plead guilty, have there?

Defendant Coleman: No.

Mr. McCormick: You're doing it freely and voluntarily?

Defendant Coleman: Yes.

Mr. McCormick: Willie C. Coleman, to Count 2 of the Information charging you with the crime of robbery, how do you plead?

Defendant Coleman: Guilty.

Mr. McCormick: And to Count 7 of the Information, charging you with the count of robbery, how do you plead?

Defendant Coleman: Guilty.

Mr. McCormick: Now Mr. Coleman, at the time of these robberies, there was with you a man named Jeter, is that correct?

Defendant Coleman: Yes.

Mr. McCormick: And he was armed with a shot gun at the time of these robberies?

Defendant Coleman: Yes.

Mr. McCormick: Is that correct?

Defendant Coleman: Yes.

Mr. McCormick: Also, Mr. Coleman, there has been alleged that prior to the time you committed these robberies you were convicted of the crime of assault with the deadly weapon, a felony, in the Superior Court of the State of Arizona on the 10th day of May, 1957. That sentence was pronounced and you served a term of imprisonment therefor in the State Prison. Do you admit that?

Defendant Coleman: Yes." (CT 111-13.)

In the affidavit filed by defense counsel, counsel stated that he had consulted with Coleman, as he and Coleman had informed the Court; that he had not

threatened Coleman nor promised him probation, thus affirming Coleman's statement to the same effect at the plea taking; and that he had informed Coleman of the maximum penalty for robbery as well as for kidnapping, information which Coleman admitted he received.

Upon consideration of Coleman's allegations and this record, the District Court found the allegations to be either legally without merit, or directly and by appropriate inference substantially controverted by his own statements in the State Court records and his petition. The Court utilized the affidavit of counsel to satisfy itself that there was no evidentiary support for any of these allegations.

REASONS FOR GRANTING THE WRIT

This case presents a question of substantial importance in the orderly consideration of issues arising in federal habeas corpus proceedings, not only relating to state prisoners but to federal prisoners as well. The decision of the Court of Appeals precludes any exercise of discretion by the District Court. Thus, every plea of guilty entered in either state or federal proceedings is now subject to a mandatory evidentiary hearing on the mere artful allegations of a prisoner, despite the fact that his allegations are not only refuted by the record but are assured of no other evidentiary support.

The decision is inconsistent with the decisions of this Court, cited as authority for it. The Court of Appeals held flatly that conflicts presented by the petition and affidavit could not be resolved without an evidentiary hearing, citing *Machibroda v. United States,* 368 U.S. 487 (1962) and *Wright v. Dickson,* 336 F.2d 878 (9th Cir. 1964). *Wright,* in turn, relied also on *Machibroda* and on *Pennsylvania ex rel. Herman v. Claudy,* 350 U.S. 116 (1956), and *Walker v. Johnston,* 312 U.S. 275 (1941). The cited cases from this Court do not support this holding, and in particular do not justify a decision rejecting the use of incontrovertible court records in reaching a factual conclusion.

In addition, the decision of the Court of Appeals is in conflict with the rule in the Eighth Circuit that affidavits may be used to determine that no substantial issues of fact exist, see *Copenhaver v. Bennett,* 355 F.2d 417 (8th Cir. 1966), and with explicit statutory language which permits the use of evidentiary affidavits. 28 U.S.C. § 2246. *A fortiori* an affidavit may properly be utilized to determine that no substantial factual issues exist.

This Court has recognized the importance of the district courts in the nearly overwhelming task of reviewing habeas corpus petitions to determine those few in their increasing numbers which may have merit. The Court of Appeals has now vastly increased that burden by insuring that no guilty plea, state or federal, has finality, and that the District Court, whatever the obvious lack of merit, must use the time of

Court and counsel to conduct a proceeding, the utter futility of which is apparent to all.[4]

ARGUMENT

AN EVIDENTIARY HEARING IS NOT A MANDATORY REQUIREMENT UNDER FEDERAL HABEAS CORPUS PROCEDURE WHEN THE FEDERAL DISTRICT COURT HAS FOUND THAT A STATE PRISONER'S CLAIM THAT HIS PLEA OF GUILTY WAS INVOLUNTARY IS REFUTED BY THE RECORD AND THAT AN AFFIDAVIT OF HIS DEFENSE COUNSEL ESTABLISHES THAT NO SUBSTANTIAL ISSUE OF FACT EXISTS TO BE RESOLVED IN AN EVIDENTIARY HEARING.

In *Townsend v. Sain,* 372 U.S. 293, 319 (1963), this Court recognized the problems involved in habeas corpus evidentiary hearings:

> "We are aware that the too promiscuous grant of evidentiary hearings on habeas corpus could both swamp the dockets of the District Courts and cause acute and unnecessary friction with state organs of criminal justice, while the too limited use of such hearings would allow many grave constitutional errors to go forever uncorrected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their permanent responsibility in this area."

The decision by the Court of Appeals in the instant case takes this discretion away from the district judge and gives it to the prisoner, with the inevitable result that the validity of every guilty plea, state or federal,

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[4]We also invite the court's attention to another recently decided Ninth Circuit case which contributes to this result: *Anthony v. Fitzharris,* 389 F.2d 657 (9th Cir. 1968).

is open to contest in an evidentiary hearing. That this will both "swamp the dockets of the District Courts and cause acute and unnecessary friction" can hardly be doubted.[5] We submit that the limitations on the discretion of the District Court established in the Ninth Circuit are erroneous as a matter of law, and unwise as a matter of policy.

A Federal District Court has the power to order an evidentiary hearing where it is necessary to decide issues of fact bearing on the constitutionality of the prisoner's detention. Where the Court can determine on the basis of the records before it that there are no issues of fact, it need not order such a hearing. *Townsend v. Sain, supra* at 312; *Brown v. Allen,* 344 U.S. 443, 460-61, 464 (1953). Thus, a Federal District Court may deny an application without an evidentiary hearing, where the record affords an adequate opportunity to do so. With the vast and continuing increase in habeas corpus petitions filed in Federal District Courts, a screening process which will eliminate frivolous petitions is absolutely essential if the few meritorious petitions are not to be buried in the avalanche. The District Court in the instant case followed a procedure which was fair to the prisoner, resulted in a conservation of judicial time and was a reasonable exercise of judicial discretion in accord with both letter and spirit of the Habeas Corpus Act.

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[5]It also encourages perjury, since any claim outside the record assures the prisoner the excitement of a trip to court. See *Weller v. Dickson,* 314 F.2d 598, 602 (9th Cir. 1963) (Circuit Judge Duniway, concurring). The increased difficulties of rehabilitation should be obvious.

The record in the case, and appropriate inferences to be drawn from it, directly refute Coleman's assertions in all important aspects. The only assertion which is not legally irrelevant or directly contradicted by the record, including his own statements to the Court, is his claim that he was not informed that the maximum possible penalty for first degree robbery is life imprisonment, and even this may be inferred from the record.

Not only is this latter allegation inconsistent with the record but it is also contradicted by the affidavit of his trial counsel. Viewed in context then, appellant's allegation is contradicted by virtually its only possible source of support. That the District Court under these circumstances determined that no substantial factual issue requiring further inquiry had been presented constituted a proper exercise of the discretion available to it.

An affidavit by defense counsel is a particularly appropriate one for use in such a case. Realistically, appellant could not hope to establish his case without supporting testimony from counsel, and even then, it might not be sufficient. *Cf., Wilson v. Rose,* 366 F.2d 611 (9th Cir. 1966). However, an affidavit from defense counsel supporting appellant's allegations might, in this instance, have raised issues substantial enough to require a further hearing. To the extent that this minor "disputed" issue of fact was resolved on the basis of the affidavit, we submit this is an entirely proper use of an affidavit.

In taking the contrary view, the Court of Appeals relied on the decisions of this Court in *Walker, Machibroda,* and *Pennsylvania v. Claudy.* None of these case supports the holding of the Court of Appeals.

In *Walker v. Johnston, supra,* this Court held only that substantial issues of disputed fact may be not decided *solely* on the basis of *ex parte* affidavits. This Court also pointed out in *Walker* that "production of the prisoner and of witnesses may be avoided, where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as a matter of law, no cause for granting the writ exists." *Id.* at 284. In *Walker,* the prisoner had entered a plea of guilty without counsel, and his claim was that counsel was not intelligently waived. The affidavit held inadequate to resolve this claim was one by prosecuting officials. There was apparently no transcript to which the Court could refer.

Similarly, in *Pennsylvania v. Claudy,* a plea was entered in the absence of counsel and a claim was made of ineffective waiver. Again, the question could not be resolved against the prisoner merely because a state prosecuting official filed a denial. The Court recognized, however, that an evidentiary hearing was not required when the factual allegations are "patently frivolous or false on a consideration of the whole record." *Id.* at 118-119.[6]

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[6]Although the Court of Appeals apparently recognized this possibility in *Wright v. Dickson, supra, Wright* may, and in light of the instant case, must, be read also as precluding the use of affidavits for any purpose.

In *Machibroda v. United States, supra,* the petitioner moved under Title 28, United States Code, section 2255 (applicable to federal prisoners only) to set aside a plea of guilty on grounds that it had been induced by promises of leniency by the prosecuting attorney. The petitioner filed detailed accounts of promises made by the prosecuting attorney, on three different occasions, identified as to time and place. In addition the petitioner alleged that the prosecuting attorney had told him that if he informed his attorney or the Court, "insisted on making a scene," unsettled matters concerning two other robberies would be added to his difficulties. *Id.* at 489-490. The prosecuting attorney filed an affidavit denying the promises or coercion, but admitting that he told the petitioner that, in testifying at the trial of an accomplice, he was to be given his last opportunity to tell the truth, a factor which might well be considered by the sentencing Court. The case is silent as to what transpired at the plea taking, except that the petitioner had stated that his plea was voluntary. *Id.* at 482 (dissenting opinion). This Court held that a hearing was required in these circumstances:

> "There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual allegations of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. . . ."

If *Machibroda* is "not far from the line," the instant case is well over on the other side. Here Coleman neither contested the statements on the record nor

explained why he made them if they were not true. Thus, the record may be used conclusively to establish that he was not threatened. Compare *Cain v. United States,* 271 F.2d 337 (8th Cir. 1959). The record and his own statements show that he was told the penalty for kidnaping, and was aware that probation was the alternative to a prison sentence. It is a reasonable inference from these facts and from the statements in open Court of *both* Coleman and his counsel that they had discussed the matter, that he was also informed of the maximum penalty for robbery. Thus, the allegation that he did not know the penalty could properly be considered frivolous by the Court, and an affidavit used to establish that, as to this insubstantial factual issue, further inquiry would produce no support for appellant's position.

This Court in *Machibroda* rejected the government's argument that a hearing would be futile in view of the prosecuting attorney's affidavit because,

> "It is not unreasonable to suppose that many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail, the mail records of the penitentiary to which he was sent, and other sources." *Id.* at 495.

In the instant case, a hearing would be the ultimate exercise in futility. The affidavit of counsel shows that Coleman's allegations, incredible on the record alone, will not have *any* evidentiary support. Thus, there is simply no substantial issue of fact to be resolved in a hearing.

Finally, the decision of the Court of Appeals is inconsistent with the explicit language of section 2246 of the Habeas Corpus Act, and is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Copenhaver v. Bennett,* 355 F.2d 417 (8th Cir. 1967).

Section 2246 provides as follows:

> "On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

Section 2246 was added to the Habeas Corpus Act after the decision of this Court in *Walker v. Johnston, supra,* and, according to the Reviser's Note, clarified existing practice without substantial change. In *Walker* this Court held that substantial disputed issues of fact could not be decided solely on the basis of *ex parte* affidavits. This Court did not purport to establish a constitutionally based rule relating to affidavits but interpreted the statute in effect at that time, which provided that the court in habeas corpus shall proceed to "determine the facts of the case, by hearing the testimony and arguments." It seems apparent that the subsequent inclusion of section 2246 in the Habeas Corpus Act permits the court to resolve substantial factual issues on the basis of affidavits, at least at the hearing. Whether the section also permits their resolution at an earlier stage, despite the Reviser's disclaimer, need not be reached

here, since the use made of the affidavits was to determine whether such an issue of fact exists, a use also proper under *Walker v. Johnston, supra.* However, if affidavits are properly used, by statute, to determine substantial issues of fact, *a fortiori,* they may be used as they were in the instant case. See *Copenhaver v. Bennett, supra.*[7]

We do not take the position that it is proper in all cases for the District Court to resolve all issues of even insubstantial fact solely on the basis of affidavits. We do take the position that the purpose of, and the expeditious resolution of, issues arising under the Habeas Corpus Act require a flexible approach with a maximum degree of discretion vested in the district judge. When allegations of a petition are concerned solely with the performance of defense counsel, and are contrary to the specific statements in the state court records, it is a particularly wise use of judicial discretion to dispose of the matter as the District Court did in this case.

This use by the District Court of defense counsel's affidavit prevents the possible serious consequences to the representation of criminal defendants by competent counsel ethically obligated to give objective and impartial advice. If counsel is to be subjected to an evidentiary hearing attacking his integrity and competence on the basis of such patently frivolous allegations, it will be increasingly difficult for him to

[7]We invite the court's attention to section 2245 which provides for use of a judge's affidavit specifically at the hearing, and to section 2247 which provides for consideration of court records when application is made, as does section 2246.

make a choice without considering a possible future attack on his professional reputation. Those who will ultimately be the losers are the criminal defendants whose rights the writ of habeas corpus is designed to secure. *Cf., Kuhl v. United States,* 370 F.2d 20 (9th Cir. 1966); *Nelson v. California,* 346 F.2d 73 (9th Cir. 1965).

Here, a defendant represented by counsel was advised by that counsel and in response to such advice entered pleas to two counts of a multicount information. Other charges, including those for which the death penalty was a possible punishment, were dismissed. Counsel informed the court that he had discussed the charges, the alternatives, and his constitutional rights with the defendant. The defendant affirmed this in open court, affirmed that no promises or threats were made, and stated that his pleas were entered freely and voluntarily because he was guilty. All this is indisputably shown by the record. In addition, an affidavit of counsel affirms the correctness of the record. Despite obviously frivolous allegations, the Court of Appeals decision now places counsel in the unenviable position of facing his former client in court to defend himself and his reputation. We submit that faced with such a future prospect at the whim of his client rather than in the sound discretion of a judge, few counsel will be able to give that impartial and wholehearted representation which is the defendant's right under the constitution. Thus, a procedure whose purpose is to secure rights will be a major instrument of their effective denial.

CONCLUSION

The opinion of the Court of Appeals in this case places a nearly intolerable burden on the District Court in resolving habeas corpus petitions, by requiring a mandatory evidentiary hearing whatever the obvious lack of merit in the allegations made. We submit that this is not only contrary to the decisions of this Court, but will contribute to an effective denial of the right to counsel when it is most needed, at the time the decision on plea is made. Because this case presents such a significant issue in the procedure to be followed in habeas corpus cases, and involves both state and federal prisoners, we respectfully urge that the writ of certiorari be granted.

Dated, San Francisco, California,
December 6, 1968.

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(Appendices A, B, C and D Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Willie C. Coleman, Appellant, vs. Lawrence E. Wilson, Warden, etc., Appellees.	No. 22,069

[October 8, 1968]

Appeal from the United States District Court
for the Northern District of California

Before: POPE, BROWNING and CARTER, Circuit Judges.

PER CURIAM:

The district court dismissed without a hearing a petition for habeas corpus alleging that appellant's guilty plea was not voluntarily and knowingly made, but was the product of (1) promises of probation, (2) fear of the death penalty, (3) threatened withdrawal of counsel on the eve of trial, and (4) appellant's ignorance of the consequences of his plea.

Since the first ground has not been presented to the state courts, we do not consider it. As to the sec-

ond ground, we agree with the district court that the record conclusively establishes it to be without merit.

We conclude, however, that the district court erred in rejecting the third and fourth grounds on the pleadings. The conflict between allegations made by appellant in his petition and the statements made by appellant's counsel in the affidavit filed by the State could not be resolved against appellant without an evidentiary hearing. *Machibroda v. United States,* 368 U.S. 487, 494, 496 (1962); *Wright v. Dickson,* 336 F. 2d 878, 882-83 (9th Cir. 1964).

Reversed and remanded for further proceedings.

Appendix B

United States District Court
for the Northern District of California

No. 45670

Willie C. Coleman,
Petitioner,
vs.
Lawrence E. Wilson, et al.,
Respondents.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, an inmate of the California State Prison at San Quentin, was convicted on September 13, 1965, upon his plea of guilty, of two counts of armed robbery and sentenced to state prison for consecutive terms. Petitioner did not appeal from this judgment.

Subsequently, he filed petitions for writ of habeas corpus in the Superior Court of San Bernardino County, the District Court of Appeal, and the California Supreme Court. All were denied.

His first application for writ of habeas corpus in this court was denied on September 23, 1966 and his petition for a rehearing was denied on December 15, 1966, for failure to exhaust state remedies. It ap-

peared that he might have a belated appeal available under Rule 31(a) of the California Rules of Court. Following his unsuccessful application to the California court for such relief and his petition to this court for a rehearing, the court considered his application on its merits. On February 10, 1967, the court issued an order to amend to reflect the pertinent facts surrounding his guilty plea alleged in general terms to be involuntary and found no merit in the other substantive grounds raised. Upon receipt of the amended petition, the court issued its Order to Show Cause. Respondents filed a timely return and counsel for respondent appeared before this court on May 25, 1967.

Petitioner has now alleged that his pleas of guilty to two counts of armed robbery were involuntary due to coercive pressures: the representations of his attorney that he would receive probation and that a deal had been made with the district attorney to dismiss all other charges; an unjustifiable fear of the death penalty instilled to coerce the plea; lack of knowledge of the consequences of his plea; and the threat of his attorney to withdraw. Upon examination of the petition, consideration of the return with its accompanying records and affidavit, and of the traverse and counter affidavit filed by petitioner, the court finds that petitioner's plea of guilty was entered in open court, freely and voluntarily, and with full awareness of the consequences.

Petitioner was arraigned on May 21, 1965, while represented by the public defender, and entered pleas

of not guilty to the twelve counts charged—one of murder, two of kidnapping for robbery, and nine of robbery. Subsequently the public defender was relieved and private counsel appointed. Shortly after his appointment, counsel succeeded in having the murder charge dismissed on the authority of the just-rendered decision of the California Supreme Court changing the California felony murder doctrine.

On August 10, 1965, petitioner and his codefendant, each represented by separate counsel, withdrew their pleas of not guilty to two counts of robbery and entered pleas of guilty. Following sentencing on September 13, 1965, the remaining counts, two of kidnapping and seven of robbery, were dismissed.

The transcript of the proceedings at the time petitioner entered his plea of guilty shows that counsel informed the court he had advised petitioner of his constitutional rights and discussed with him the charges and the alternatives. Consistent with this record, counsel's affidavit states that petitioner was advised of the consequences both of entering the plea and of going to trial on the counts charged. Petitioner's responses to the examination indicate that he understood the charges and had discussed them with his attorney.

Petitioner was asked if he were pleading guilty because he was guilty and if the plea was free and voluntary. To both he answered yes. When asked if any threats or promises had been made to make him plead guilty he replied no. At no time during the proceedings did petitioner indicate in any way that he

had been threatened by his attorney or promised leniency. Nor was the promise of probation mentioned in the petition filed by petitioner in the California Supreme Court. Consistent with this record, counsel denies that any such promise was made.

Additionally, petitioner's claim that he did not know the consequences of pleading guilty is inconsistent with his claim that probation was part of a "deal." It could only have been inducement if he were aware the alternative was a prison sentence. Moreover, even if counsel had "promised probation," the opinion of counsel that leniency will be granted provides no basis for relief on habeas corpus. *Gilmore v. California,* 364 F.2d 916, 918 (9th Cir. 1966); *Pinedo v. United States,* 347 F.2d 142 (9th Cir. 1965).

The record shows that after petitioner entered his pleas of guilty to two charges, seven charges of robbery and two of kidnapping were dismissed. Petitioner states that his pleas were entered because his attorney arranged this bargain with the district attorney. This fact, however, does not invalidate the guilty pleas. See *Gilmore v. California, supra.* A guilty defendant must always weigh the possibility of his conviction on all counts and the possibility of his getting the maximum sentence, against the possibility that he can plead to fewer or lesser offenses and perhaps receive a lesser sentence. *Cortez v. United States,* 337 F.2d 699, 701 (9th Cir. 1964). This is also true of petitioner's fear of the death penalty instilled, he alleges, to coerce his plea. Under California law, petitioner faced a mandatory penalty

of either death or life imprisonment without possibility of parole. Counsel was, of course, obligated to inform his client of these possible penalties. By pleading guilty to two counts of robbery, petitioner avoided any possibility of being given the death penalty, and achieved the possibility of future parole. Review of the transcript of the preliminary hearing supports the judgment of counsel in recommending such action. The fact that petitioner was thus confronted with a hard choice, and chose the lesser evil does not make his plea of guilty involuntary. *Gilmore v. California, supra.*

Petitioner's allegation that counsel threatened him by giving him 24 hours to change his plea or forego representation is directly refuted by the record. Petitioner alleges that the deadline was set on August 9, 1965, when trial was to begin on August 10, 1965. Counsel, therefore, was entirely accurate if he stated petitioner had only 24 hours in which to decide to plead guilty—trial was due to commence at that time. As far as the "threat" is concerned, petitioner not only stated in open court that he had not been threatened, but must have been aware that the court had power to appoint other counsel since it had done so previously. In addition, counsel denies any such threat.

On review of the entire record, it is clear that petitioner was ably represented, that the advice given by counsel was sound, and that it achieved for petitioner what appears to be the best result possible in the circumstances. Petitioner's responses were made

in open court, were clear and unequivocal, and gave no indication of any duress or lack of understanding. The court finds, therefore, that petitioner's plea was not coerced, and that he was adequately represented by counsel.

Accordingly, the petition is denied, the order to show cause is discharged and the proceedings are dismissed.

Dated: June 6, 1967.

Alfonso J. Zirpoli
United States District Judge

Filed June 6, 1967,
Clerk, U.S. District Court

Appendix C

SECTIONS OF UNITED STATES CODE—TITLE 28

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial re-

sulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner shall be admissible in evidence.

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

Appendix D

In the United States District Court for the Northern District of California

Case No. 45670

Willie C. Coleman, Petitioner,
vs.
Lawrence E. Wilson, et al., Respondents.

AFFIDAVIT OF DAN O'NEILL, ATTORNEY AT LAW

State of California,
County of Los Angeles—ss.

Dan O'Neill, being first duly sworn, deposes and states:

1. That he is an attorney at law licensed to practice in the State of California.

2. That on July 7, 1965 the Public Defender was relieved as counsel for the petitioner herein and your affiant was appointed as his counsel. That affiant obtained a copy of the transcript of the testimony taken at the preliminary examination concerning petitioner and ascertained that he was charged with 9 counts of robbery and 2 counts of kidnapping for the purpose of robbery, together with 1 count of murder. That at

the time of his appointment, the Supreme Court of the State of California had just rendered its decision in the case of People v. Washington, 62 C. 2d, p. 777. That affiant was familiar with what appeared to be a change in the "felony murder doctrine" of this state and so advised the trial court and requested permission to withdraw the plea previously entered by the Public Defender for the purpose of moving under the provisions of Section 995 of the Penal Code of this State as to the murder count.

3. On July 12, 1965, petitioner, through counsel, was permitted to withdraw his plea and the Motion under 995 was continued until July 29, 1965 for argument. On that date the Motion was granted as to the murder count, and the trial of the remaining counts was set for August 10, 1965. Between July 29, 1965 and the trial date your affiant counseled with one Joseph Rosen, the attorney for the co-defendant, and it was the considered opinion of affiant and Mr. Rosen that the charges against both petitioner and his co-defendant could not be successfully defended and the gravity of such charges was such that some efforts should be made to effect a disposition by way of a plea to a lesser number of counts, and in particular to avoid the hazard of a conviction on either of the 2 counts alleging violations of Section 209 of the Penal Code of this state.

4. That thereafter negotiations were entered into by and between affiant and Mr. Rosen with the Office of the District Attorney of this county, the result being said Office agreed to take a Plea of Guilty by

each defendant to 2 counts of armed robbery. In company with Mr. Rosen affiant interviewed Mr. Coleman and his co-defendant in the County Jail of Los Angeles County a few days prior to the date petitioner entered his Plea of Guilty; that at the time of said interview both affiant and Mr. Rosen advised the two defendants of the penalty provided by Section 209 of the Penal Code of this state dealing with the offense of kidnapping for the purpose of robbery and carrying, at the discretion of the jury, the possibility of life sentence without possibility of parole, or death in the event person or persons suffered bodily harm during the commission of said offense.

5. Affiant did advise petitioner and recommended to him that he enter a Plea of Guilty to the 2 charges of robbery, telling him that he would be eligible for parole in the future following the entry of such a plea, and that he could avoid the possibility of looking forward to nothing except spending the remainder of his life in prison if adjudged guilty of Section 209 by the jury. That no effort was made to instill any fear on the part of the petitioner by affiant but rather the effort by affiant was directed to acquainting the petitioner with the problems and hazard faced by him in view of the number and nature of the charges against him and the testimony given against him during the course of the preliminary examination.

6. That your affiant, since receipt from the Office of the Attorney General of this State of a copy of the Amendment to Petition filed by Mr. Coleman, has re-read in its entirety the transcript of the testimony

taken at the preliminary examination of Mr. Coleman consisting of some 250 pages of testimony; that, in addition, he has read the complete file pertaining to the arrest and conviction of the petitioner.

7. That your affiant is a man of some experience in the criminal law and is the past president of the Criminal Courts Bar Association of this county, an association comprised of members of the legal profession who specialize in the defense of persons charged with crimes against the state. That it was the opinion of affiant at the time the petitioner was counseled to enter his plea that said plea was well advised, and that after re-reading the transcript of the preliminary hearing together with the contents of Superior Court File No. 200527 containing, among other things, statements made by each defendant to the probation officer, your affiant is still of the professional opinion that the plea was well counseled. In this connection, affiant denies that he ever advised petitioner that he would be granted probation on a plea if he plead Guilty to 2 counts of armed robbery. It is possible and probable that affiant advised the petitioner of the number of hours remaining between the time the plea was advised and the time the case was set for trial, and that he further indicated that he, the petitioner, would have to make his decision during those hours so that affiant would be in a position to advise the Court whether or not the case would go to trial.

8. Your affiant did advise petitioner of the penalty for first degree robbery, and at no time did

affiant advise petitioner he would withdraw from his defense unless he entered the suggested Guilty plea. On the contrary, affiant did advise petitioner that in his opinion the only person who could profit by the trial of the issues involved would be he, the affiant, being allowed a very substantial fee for a trial that would probably last ten days to two weeks.

9. To the best of the recollection of your affiant, petitioner Coleman at no time has ever stated to him that he resisted the offer proposed to him by your affiant as to the 2 counts of robbery, nor did he ever demand that he be given a trial on the charges.

10. Affiant admits that he did not tell petitioner how much time he, petitioner, would have to spend in state prison inasmuch as affiant had no way of knowing whether the Trial Court would order the sentence to run consecutive or concurrent as to the two counts involved and, in addition, had no way of knowing what action would be taken by the Adult Authority of this State following receipt of the record. In short, all the efforts of your affiant were directed on behalf of Mr. Coleman to prevent the possibility of a conviction and sentence under Section 209 of the Penal Code with the extreme penalties provided for therein.

Dan O'Neill

Subscribed and sworn to before me this 15th day of May, 1967.

(Seal) James G. Cooney,
Notary Public. My commission expires March 27, 1968.